

WP(C) 298/2005

BEFORE

THE HON'BLE MR. JUSTICE H. N. SARMA

(1) Common questions of law on the basis of almost similar facts, as projected in this batch of writ petitions, having arisen for determination and adjudication on the prayer of the learned counsel for the parties, all the writ petitions are heard analogously and disposed of by this common judgment.

(2) WP (C) No. 298 (AP) 2005, WP (C) No. 257 (AP) 2005 and WP (C) No. 9 (AP) 2005, have been filed challenging the seniority of the respondent No. 4, Sri M. Ngomdir to the cadre of Executive Engineer and the relaxation given to him by the respondent authority relaxing his qualifying period of service that are necessary for the purpose of promotion to the next higher grade counting his ad hoc period of service as Assistant Engineer. The petitioner has also challenged the subsequent promotion of the respondent No. 4 to the rank of Superintending Engineer dated 1. 12. 2003 and his regularization with effect from 14. 3. 97 as Executive Engineer issued vide order dated 23. 10. 2003.

In WP (C) No. 197 (AP) 2005, the petitioner has challenged the legality and validity of the regularization order dated 22. 12. 95 by which the respondent No. 4, Sri L. Ango and Sri M. Ngomdir have been given relaxation of their qualifying service as Assistant Engineer for the purpose of promotion to the next higher grade of Executive Engineer. In WP (C) No. 261 (AP) 2003, the petitioner has further challenged the legality and validity of the order dated 24. 9. 2002 by which the ad hoc period of service in respect of Sri L. Ango was regularized with effect from 20. 10. 95. In this writ petition, the petitioner has also challenged the order dated 28. 5. 2003 by which Sri L. Ango was further promoted to the rank of Superintending Engineer on officiating basis.

In WP (C) No. 362 (AP) 2004, the petitioner has challenged the legality and validity of the order dated 11. 11. 95 by which the respondent No. 4, Sri G. Ete, has been provided with the benefit of relaxation of qualifying service for giving him the benefit of promotion to the next higher rank of Superintending Engineer counting his ad hoc period of service as Executive Engineer with a prayer to direct the respondents to constitute a review DPC to consider the case of the petitioner for promotion to the rank of Superintending Engineer with retrospective effect from 21. 12. 2001. Again in WP (C) No. 8 (AP) 2004, the petitioner has challenged the order of promotion of Sri G. Ete, respondent No. 4, to the rank of Superintending Engineer on regular basis vide order dated 21. 12. 2001 and his further promotion to the rank of incharge Chief Engineer vide order dated 29. 10. 2003. The petitioner has also prayed for setting aside the communication dated 19. 11. 2003 whereby the respondent authority did not consider the case of the petitioner for promotion.

(3) Necessary facts as disclosed from the pleadings of the parties, those are necessary to be stated for the purpose of disposal of this batch of writ petitions are summarized below. The petitioner was appointed as Assistant Engineer in the Rural Works Department, Government of Arunachal Pradesh, vide order dated 6. 11. 1981 on temporary basis with effect from 28. 9. 1981. The aforesaid appointment was made after holding necessary DPC, inasmuch as, the State Public Service Commission was not set up at the relevant time. The appointment of the petitioner to the said post was on regular basis. On 25. 8. 84, Sri G. Ete was appointed as Assistant Engineer in the department on ad hoc basis and his service was regularized with effect from 23. 10. 86. Similarly, Sri M. Ngomdir was appointed on ad hoc basis as Assistant Engineer in the department vide order dated 7. 3. 89 and subsequently vide order dated 19. 10. 90 Sri M. Ngomdir was appointed afresh on regular basis as Assistant Engineer. In the like manner Sri L. Ango was appointed as Assistant Engineer vide order dated 19. 10. 90 who joined in his service on 5. 11. 90 on regular basis, Sri G. Ete was appointed as Assistant Engineer on 25. 8. 84 and thereafter by holding regular DPC he was appointed on regular basis on 23. 10. 86.

(4) It is the case of the petitioner that he is the senior most amongst all the three aforesaid officers in the cadre of Assistant Engineer. The promotion to the next higher grade as per the Recruitment Rules is the Executive Engineer. There is set of Recruitment Rules known as \the Recruitment Rules, (to Central Civil Service to Grade-I post under the Rural Works Department) 1984 in the Arunachal Pradesh\ which was published vide notification dated 28. 1. 85 framed under Article 309 of the Constitution of India regulating the promotion to the rank of Executive Engineer from Assistant Engineer. As per schedule appended to the said Recruitment Rules, the qualifying service for consideration for promotion to the rank of Executive Engineer from Assistant Engineer is eight years. The Recruitment Rules also contains a provision regarding relaxation in rule No. 5 which is quoted herein below :

\power to relax : Where the administrator of Arunachal Pradesh is of the opinion that it is necessary and expedient so to do, he may by order for the reasons to be recorded in writing and in consultation with the Arunachal Pradesh Selection Board relax any of the provision of these rules with respect to any class or category of persons. \

(5) In the schedule of the Recruitment Rules also contains two notes. In Rule No. 1, it is provided that the qualification and experience is/are relaxable at the discretion of the administrator in the case of candidates of SC/st, if the administrator is of the opinion that sufficient number of candidates are not likely to be available to fill up the posts reserved for them. It is the common grievance of the petitioner against the respondents that when the occasion arose for consideration for promotion to the rank of Executive Engineer from that of the Assistant Engineer, the respondent officers were not having fulfilled the eligibility criteria for such consideration, inasmuch as, they did not completed the qualifying service period of eight years as Assistant Engineer, the respondent authorities vide the impugned order dated 22. 12. 95 relaxed the qualifying service period so far as Sri M Ngomdir and Sri L. Ango are concerned and their ad hoc period of service as Assistant Engineer were relaxed for the purpose of counting their qualifying service as Assistant Engineer for promotion to the next higher grade of Executive Engineer. The similar relaxation was also granted to the other officer, namely Sri G. Ete on 11. 11. 95. In the meantime all the parties were promoted to the rank of Executive Engineer on basis of relaxation of qualifying service and counting of ad hoc period of service in the rank of Assistant Engineer, at later point of time, the cases of the respondents were considered for their further promotion to the rank of Superintending Engineer. It is to be noted herein that as per the Recruitment Rules of Superintending Engineer the qualifying period of service as Executive Engineer originally was five years which was subsequently enhanced to six years. There is no dispute about this position in service rules amongst the parties and the State respondents are applying this period all through out for the purpose of consideration of promotion to the rank of Superintending Engineer. The grievance of the petitioner is that if relaxation were not given to the respondents in purported exercise of powers under Rule 5 of the Recruitment Rules, none of the respondents could have been promoted to the rank of Superintending Engineer ignoring the case of the petitioner and the respondents were promoted to the rank of Superintending Engineer without they having the qualifying service as required under the Recruitment Rules. As indicated above, the petitioner has also challenged the further officiating promotion of Sri G. Ete to the rank of Chief Engineer.

(6) Counter affidavits have been filed by the concerned respondents including the State respondents controverting the prayer of the petitioner made in this batch of writ petition.

(7) I have heard Mr. M. Pertin, learned counsel for the petitioner, Mr. T. Pertin, learned counsel for the respondent No. 4 in WP (C) No. 298 (AP) 2005, WP (C

) No. 257 (AP)2005 and WP (C) No 9 (AP) 2005 and Mr. C. K. S. Baruah, learned Advocate General, Arunachal Pradesh assisted by Ms. G. Deka, learned GA, Arunachal Pradesh, on behalf of the State respondents in all the writ petitions. None appears on behalf of the respondent No. 4, Sri G. Ete, in WP (C) No. 8 (AP) 2005 and WP (C) No. 362 (AP) 2004.

(8) Mr. M. Pertin, learned counsel for the petitioner, submits that the relaxation order impugned in this proceeding giving benefit of relaxation of qualifying service to the concerned respondents is not only illegal and arbitrary but also the same was passed in violation of the provisions of Recruitment Rules, itself. It is contended that such relaxation can be granted not to an individual but with respect to any class or category of persons that too by passing a reasoned order in writing justifying such relaxation and in consultation with the Arunachal Pradesh Selection Board. But in the instant case, those pre-conditions not having been fulfilled the said relaxation on the face of it illegal, unjust and improper and the respondents cannot be permitted to take the benefit of such order. Mr. M. Pertin further submits that the relaxation of the respondents, more particularly, the respondent No. 3, M. Ngomdir, whose service as Executive Engineer with effect from 31. 8. 92 is also illegal and unjust in view of the settled principles of law that period of ad hoc service cannot be counted for regularization for the purpose of counting seniority. Further contention of the learned counsel is that the said relaxation so given to the respondents being condition of appointment is not permissible under the law. Submitting in the aforesaid manner Mr. M. Pertin argues that in view of such illegal relaxation given to the respondents, their promotions to the rank of Superintending Engineer is invalid in law, they not having been qualified in true sense of the term as per the Recruitment Rules to hold the post for being not having the minimum qualifying service as per service rules.

(9) Per contra, Mr. C. K. S. Baruah, learned Advocate General, Arunachal Pradesh, submits that after trifurcation of the Rural Works Department of the Government of Arunachal Pradesh, several officers have opted to render their services in the other two departments leaving a very few APST officers in the IFCD Department and the petitioner and the respondents also opted for the IFCD Department. In such a situation, it was necessary for manning the department by giving promotion to qualified officers to the rank of Executive Engineer. But in view of non-availability of qualified APST candidates having requisite period of qualifying service in the feeder post of Assistant Engineer such relaxation had to be given to the concerned respondents as empowered by the Recruitment Rules and there is no illegality in passing such an order. It is further contended that the aforesaid relaxation order was passed in the year 1995 and the petitioner is guilty of laches in not challenging the same promptly which will unsettle the position as exists now. The learned Advocate General further submits that in view of the subsequent enhancement of reservation quota vide notification dated 1. 2. 2001 raising the reservation from 40% to 50% in respect of Grade B to Grade A and from Grade A to A officers, the promotion of the respondents are protected under the said provisions, inasmuch as, all of them are the APST candidates in the department. It is also contended that as per the aforesaid notification, the same would not be applicable in the matter of determining the seniority and also clearance of backlog. There is also no dispute that the said notification would come into force prospectively, i. e. with effect from 1. 2. 2001.

(10) Mr. T. Pertin, learned counsel for the respondent No. 4, has adopted the submissions made by the learned Advocate General and in addition to it submits that the petitioner has failed to make out a case for exercising the jurisdiction of this Court under Article 226 of the Constitution of India and in the absence of unless there is any violation of fundamental or other legal rights of the petitioner. It is also contended that the cases of the petitioner was considered by the authorities and it was assured to be considered by the respondents as and when regular DPC would be held. Arguing in elaborate manner and referring to var

ious materials available on record, it is submitted by Mr. T. Pertin that under no circumstances, the petitioner who does not fall within the reserved category is entitled to any relief in this writ petition, more particularly, on the face of existence of the reservation notification dated 1. 2. 2001 wherein the reservation has been extended from 40% to 50%.

(11) I have considered the rival submissions made by the learned counsel for the parties. The basic question that needs to be adjudicated in this batch of writ petition is as to whether the impugned order of relaxation granted to the respondents is valid in law or as to whether the petitioner is grossly negligent in challenging the relaxation order passed in favour of the respondent officers in the year, 1995.

(12) An answer to the above question would virtually cover the dispute raised in this writ petition, inasmuch as, the impugned promotion of the respondents were made sequel to the relaxation order. If the relaxation order is held to be invalid the impugned order of promotion would have no legs to stand. The petitioner having challenged the impugned order of relaxation dated 22. 12. 2001 has specifically pleaded at paragraph-12 of the writ petition that it was came to his knowledge about the existence of relaxation order dated 22. 12. 2001 only on receipt of the counter affidavit of the State respondents filed in WP (C) No. 257 (AP) 2005 wherein the State respondents relied on the said relaxation order to support their action. Coming to know about the existence of such an order, the petitioner has immediately challenged the same in WP (C) No 295 (AP)2004. The State respondents in their counter affidavit have not been denied the said averment and in reply to the said paragraph, in paragraph-6 of the counter affidavit, the State respondents pleaded having no comment as those are matter of records. Paragraph-7 of the counter affidavit made in reply to paragraph-13 of the writ petition, it is stated that the said order was not passed silently rather it was passed openly without any secrecy therein and such an order was circulated to the Chief Engineer of the trifurcated department. The writ petition was filed on 11. 8. 2005 and at this final stage of hearing I am not inclined to throw out the same on the ground of delay, more particularly, in view of the averments made by the petitioner on oath at paragraph-12 of the writ petition which is not controverted by the respondents. It is true that the respondents has given some explanation at paragraph-7 of the counter affidavit but that does not nullify the specific contention of the petitioner and accordingly, I am not inclined to accept the submissions made by the learned counsel for the respondents that the petition should be dismissed on the ground of delay and laches.

(13) Coming to the point of legality and validity of the relaxation order dated 22. 12. 2005 (in respect of Sri M. Ngomdir and Sri L. Ango) it is seen that the said order apparently do not disclose any reason on what count it was passed. The said order is quoted herein below in its entirety.

\order dated Itanagar, the 22nd Dec. '95 no. RWD/sectt/30 (35)89 : The Governor of Arunachal Pradesh is pleased to accord relaxation of the qualifying services in respect of Shri L. Angu and Shri M. Ngomdir, Assistant Engineer by accounting their ad hoc period of service as Assistant Engineer from the date of their ad hoc appointment as a special case for counting toward qualifying service for the next higher post of Executive Engineer. Sd/- J. M. Tangu, commissioner (RWD)Govt. of Arunachal Pradesh itanagar. \

(14) Admittedly the aforesaid power of relaxation was passed in exercise of the power under rule 5 of the Recruitment Rules as quoted above. On a close scrutiny of the said rule, it is apparent that the following conditions are required to be fulfilled before exercising the said power of relaxation so vested upon the authority.

(a) the authority must be of the opinion that it is necessary or expedient to pr

provide such relaxation; (b) after formation of such opinion only such an order of relaxation is to be passed in writing; (c) the order must record the reason for giving such relaxation; (d) the order should be passed in consultation with the Arunachal Pradesh Selection Board and (e) such relaxation may be given with respect to any class or category of persons.

(15) The respondents contend that as per column 13 of the Recruitment Rules providing for the circumstances in which the Arunachal Pradesh Selection Board to be consulted in making recruitment wherein it is stated as \na\ meaning thereby \not available\ in the factual context of the present case the Arunachal Pradesh Selection Board is not to be consulted. The rules itself has provided that such consultation should be made with the Arunachal Pradesh Selection Board before giving such relaxation. Hence, the said argument of the learned counsel for the respondents will not help them in any way. The order of relaxation as quoted above, ex facie, does not disclose that the necessary preconditions have been fulfilled or the authority has formed an opinion on it that such relaxation is necessary. No justification has also been disclosed in the counter affidavit of the respondents. In the counter affidavits filed in other related writ petitions also no such justification has been forthcoming from the State respondents. No records have also been produced disclosing such justification. In fact, the learned counsel for the State respondents could not justify at all from the records under what circumstances such relaxation was given to the aforesaid three respondents. One of the essential conditions for exercising the power as provided under the relaxation clause No. 5 is that such relaxation can be given to any class or category of persons. In the instant case, in gross violation of the said provision, relaxation has been given individually that too without recording any reason thereof, as highlighted above.

(16) A bare reading of the provisions of the Recruitment Rules along with its schedule disclose that qualifying period of service for consideration for promotion to the higher rank is an essential condition for appointment by way of such promotion. A person not having such qualification cannot be said to possess the eligibility criteria for consideration of his case for promotion to the next higher rank. In support of submissions that such qualifying period of service being an essential condition and the same cannot be relaxed in exercise of the relaxation clause, Mr. M. Pertin relies on the following decisions. 1) 2003 (2) GLT 78 : 2003 (2) GLR 411 (Ananda Ram Borah and Ors. Vs. State of Assam and Ors.- DB), 2) 1993 Supp (3) SCC 575 (Syed Khalid Rizvi and Ors. Vs. Union of India and Ors.) 3) (1993) 2 SCC 213 (Dr. M. A. Haque and Ors. Vs. Union of India and Ors.) 4) (1993) 2 SCC 486 (State of Orissa Vs. Sukanti Mohapatra), 5) (1994) 2 SCC 640 (J and K Public Service Commission Vs. Dr. Narinder Mohan), 6) WP (C) No. 377 (AP) 2005 (Shri Tani Tasing Vs. State of Arunachal Pradesh and Ors. (disposed of on 3 . 1. 2006).

(17) In the case of Ananda Ram Borah (supra), the Hon'ble Chief Justice Mr. P. P. Noalekar, as his Lordship then was, speaking for the Court, referring to various decisions of the Apex Court held at paragraph-7 as follows :

\under Rule 29 if the appointing authority is satisfied that operation of any of the 1963 Rules would cause undue hardship, the appointing authority can dispense with or relax the requirement of that Rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner. The power to relax a particular Rule could be exercised by the appointing authority on its satisfaction that a particular requires special treatment to provide just and equitable relief to a person or persons concerned. The question, which calls for determination by this Court, is, whether the power to relax the Rule would go to the extent of relaxing conditions of recruitment also or it can be only to the extent of relaxing the conditions of service ? Can a direct recruit for recruitment to the post of LDA avoid competitive examination ? Can the Govt. exercise power of relaxation of Rule of recruitment requiring a

direct recruit to appear in the competitive examination and such relaxation of the recruitment Rules is permissible. In Keshab Chandra Joshi Vs. Union of India reported in 1992 Supp (1) SCC 272, the Apex Court has emphasized the need of strict compliance of the recruitment Rules for both direct recruits and promotees.

It is held that there cannot be any relaxation of the basic or fundamental Rules of recruitment. That was a case where the Rule pertaining relaxation of conditions of service came for consideration and it was held by a three Judges Bench that the Rule did not permit relaxation of the recruitment Rules. In Syed Khalid Rizvi Vs. Union of India, 1993 Supp (3) SCC 575, the Apex Court observed. \the condition precedent, therefore, is that there should be an appointment to the service in accordance with Rules and by operation of the Rule, undue hardship has been caused. . . . it is already held that the condition of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed. Thus according to the Apex Court there is distinction between the conditions of recruitment and conditions of service. Appointment has to be made in accordance with the recruitment Rules and, thereafter, there may be a relaxation in the service condition. Similarly, in State of Orissa Vs. Sukanti Mohapatra, (1993) 2 SCC 486, it was held that though the power of relaxation stated in the Rule was in regard to \any of the provisions of the Rules\, this did not permit relaxation of the Rule of direct recruitment without consulting the Commission and the entire ad hoc service of a direct recruit could not be treated as regular service. In (Dr.) M. A. Haque Vs. Union of India (1993) 2 SCC 213 and in J and K Public Service Commission Vs. Dr. Narinder Mohan (1994) 2 SCC 630, it has been emphatically laid down that the Rule relating to recruitment could not be relaxed. The judgment in the matter of Suraj Prakash Gupta (supra) has also reiterated the principle laid down by the Apex Court that there cannot be any relaxation of the conditions of recruitment. The conditions of recruitment and conditions of service are distinct. The Govt. has the power to relax conditions of service whereas the conditions of recruitment cannot be relaxed even though the Rule intends to do so. In the present case, admittedly the appellants were not appointed on the post of LDA after competitive examination. Their appointments were made relaxing the Rule of appointment exercising the powers under Rule 29. The power to relax cannot accede to the conditions of recruitment, which is competitive examination. As no competitive examination was held, appointment of the appellants cannot be said to be in conformity with the 1963 Rules. The appointment order itself indicates the nature of appointment, which says that the appointments may be terminated at any time without notice and without assigning any reason. The appointment itself appears to be temporary in nature. Such an appointee cannot be placed senior over the persons who have been recruited in the service in accordance with the Rules cannot claim seniority over the persons who have been regularly recruited in accordance with the service Rules. The claim made by the appellants for assigning seniority from the date of their appointment cannot be entertained. The Judgment and Order dated 23. 5. 2002 passed by the learned Single Judge in Review Application No. 100 of 2000 does not require any interference by us. The appeal fails and is dismissed, there shall not be any order as to costs. \

The Division Bench of this Court decided the law on the basis of the decision of the Apex Court referred by Mr M. Pertin which have been referred therein.

(18) It has already been highlighted above as to the manner and method in which the power of relaxation was exercised by the respondent authorities in passing the impugned order of relaxation in favour of the respondents. As decided by various judicial pronouncement of the Apex Court as well as of this Court above, it is undoubtedly clear that the eligibility criteria for promotion to the rank of Superintending Engineer being the minimum period of service in the post of Executive engineer six years is a condition of appointment by promotion and the same cannot be relaxed. Further in granting such relaxation even necessary pre-condition as required to be complied with has also not been fulfilled. Situated thus, I have no hesitation to hold that the aforesaid relaxation was granted to the respondents in violation of the recruitment Rules having statutory character fra

med under Article 309 of the Constitution of India.

(19) In view of the aforesaid discussions and decisions, the impugned order of relaxation relaxing the qualifying period of service granted in favour of the respondents so as to enable them to come within the zone of consideration for promotion to the rank of Superintending Engineer was not a valid exercise of power and the same has been issued in infraction of the statutory rules covering the field and, as such, the relaxation orders in favour of the respondents are set aside and quashed.

(20) Upon having held the impugned order of relaxation as illegal and upon quashing of the same, the consequential orders passed on the basis of such relaxation also falls through. The matter is sent back to the Commissioner and Secretary, IFCD Department, Government of Arunachal Pradesh, for passing necessary consequential order and the respondent authorities shall also consider the case of the petitioner for promotion in accordance with existing law and pass appropriate orders within a period of two months from the date of receipt of a certified copy of this order.

(21) No costs.